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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

BYWATER NEIGHBORHOOD ASSOCIATION,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.,*
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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REPLY BRIEF OF PETITIONER IN SUPPORT OF CERTIORARI

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REPLY BRIEF OF PETITIONER IN SUPPORT OF CERTIORARI

The federal respondents offer a highly formalistic interpretation of the relevant statutes in urging this Court not to address the two troubling jurisdictional questions raised by the Fifth Circuit's decision — namely, which court has jurisdiction to review petitioner Bywater Neighborhood Association's claims, and when may petitioner obtain judicial review. We first reply to the respondents' argument that the Neighborhood Association's claims under the National Historic Preservation Act ("NHPA"), 16 U.S.C. §§ 470 *et seq.*, and the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 *et seq.*, are necessarily consigned to the United States Court of Appeals for the District of Columbia Circuit by the exclusive review provision of the Communications Act of 1934, 47 U.S.C. § 402(b). Although respondents ignore the question of the timing of review, we then explain why the Fifth Circuit's ruling that review is barred until after the Federal

Communications Commission ("FCC") issues a final licensing order — after the offending tower has been erected — threatens the policy objectives of NHPA and NEPA, and highlights the need for review by this Court.

Before addressing these points, however, it is important to set the record straight on the scope of the FCC's authority over the construction of the broadcast tower at issue in this proceeding. Respondents argue that the FCC has no authority over the construction of the tower, and hence it is powerless to act under NEPA and NHPA until it reviews the application for an operating license. Opposition ("Opp.") at 8-9.

That is not the case. Section 319(a) of the Communications Act provides that the FCC may not issue an operating license "unless a permit for construction has been granted by the Commission." 47 U.S.C. § 319(a). While petitioner does not challenge the FCC's discretion to engage in one-step licensing generally, *see id.* at § 319(d), petitioner has consistently argued that, through its one-step licensing procedures, the FCC has abdicated its duties under NEPA and section 106 of NHPA by failing to consider the impact that construction of the tower will have on the Bywater Historic District until after the tower is built. *See Vieux Carre Property Owners, Residents & Associates, Inc. v. Brown*, 875 F.2d 453, 464 (5th Cir. 1989), *cert. denied*, 110 S. Ct. 720 (1990); *see also* 47 C.F.R. § 1.1312 (1988)(FCC's regulations requiring the agency to consider the impact of construction under NEPA and NHPA even where the agency is using its one-step licensing procedures). Accordingly, there can be no doubt that the FCC has the authority to address petitioner's objections to the construction of the tower now.

A. The Proper Court

There are at least three flaws in respondents' argument that the D.C. Circuit has exclusive jurisdiction

over the Neighborhood Association's claim: (1) it misapprehends the scope and purpose of 47 U.S.C. § 402(b); (2) it is flatly at odds with the Third Circuit's decision in *Susquehanna Valley Alliance v. Three Mile Island Nuclear Reactor*, 619 F.2d 231 (1980), *cert. denied*, 449 U.S. 1096 (1981); and (3) it disregards the teachings of this Court's decision in *Florida Power & Light Co. v. Lorion*, 470 U.S. 729 (1985).

1. Respondents significantly overstate the sweep of 47 U.S.C. § 402(b), which vests exclusive jurisdiction in the D.C. Circuit to review FCC "decisions and orders" regarding applications for "construction" and "station license[s]." Reading § 402(b) far more broadly than its language suggests, respondents argue that § 402(b) relegates petitioner to pursuing its claims under NHPA and NEPA before the D.C. Circuit, because petitioner's claims arose in the context of an FCC licensing proceeding. Opp. at 9.

The most glaring problem with respondents' analysis is that it ignores both the language of and purposes underlying § 402(b). Contrary to respondents' contention, the Neighborhood Association did not challenge any licensing "decision" or "order" by the FCC; indeed no FCC decision has been issued in this matter. The Neighborhood Association's complaint, which is reproduced as an appendix to the brief of *amicus curiae* National Trust for Historic Preservation in the United States, challenged only the FCC's failure to comply with its nondiscretionary duties under NHPA and NEPA to assess the impact the broadcast tower would have on the Bywater Historic District before permitting construction to proceed. These claims do not arise under the Communications Act, and may proceed independently of FCC action on the pending application for an operating license. *Cf. Susquehanna Valley Alliance v. Three Mile Island Nuclear Reactor*, 619 F.2d 231, 239-42 (3d Cir. 1980), *cert. denied*, 449 U.S. 1096 (1981).

Respondents' argument also cannot be squared with the purposes underlying § 402(b). Congress enacted § 402(b) to ensure that all cases involving FCC construction and licensing orders are referred to a single court — both to foster expertise within the court on the highly technical issues that often lie at the core of FCC licensing decisions, and to ensure uniformity in judicial review of FCC orders. *Scripps-Howard Radio v. FCC*, 316 U.S. 4 (1942). This case raises no broadcast issues within the compass of the Communications Act, nor does its resolution require the special expertise of the D.C. Circuit in communications matters.

Nonetheless, under respondents' theory, instead of filing a complaint in the district court, where the parties reside and the damage is taking place — as is typical in NHPA and NEPA proceedings — the Neighborhood Association should have filed a petition for mandamus in the D.C. Circuit, relying on *Telecommunications Research & Action Center v. FCC ("TRAC")*, 750 F.2d 70 (D.C. Cir. 1984). *See* Opp. at 11. Petitioners would then have had to seek emergency relief from the court of appeals to block further construction of the tower. At that point, however, no administrative record would be available for review, and the court of appeals would plainly not be suited to conduct the fact-finding required in NHPA and NEPA cases.[1] Hence, the appeals court would have had little choice but to refer the proceeding to a special master, a district judge, or perhaps even the agency, to assemble a record. Once that task was completed, the appeals court would then have had to review the record on the merits and render a decision.

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[1] Both NEPA and NHPA cases are often fact-intensive. In NHPA cases, for example, there are typically disputes over the impact the proposed action will have on the historical resources, and whether the agency has adequately consulted with local officials. *See Friends of Sierra R.R. v. ICC*, 881 F.2d 663 (9th Cir. 1989), petition for cert. pending *sub nom. Tuolomne Park & Recreation Dist. v. ICC*, No. 89-701.

TRAC, 750 F.2d at 78. At a minimum, respondents' theory condemns the D.C. Circuit to squander the resources of three circuit judges in supervising environmental, historical preservation, and any other litigation that conceivably relates to FCC decisions, even though the case neither raises a claim under the Communications Act nor challenges an "order" or "decision" within the meaning of § 402(b).

2. Respondents recognize that their jurisdictional theory, and that adopted by the Fifth Circuit in this case, cannot readily be reconciled with that developed by the Third Circuit in *Susquehanna Valley Alliance v. Three Mile Island Nuclear Reactor*, 619 F.2d 231 (1980), *cert. denied*, 449 U.S. 1096 (1981). Nonetheless, respondents contend that *Susquehanna* does not "present a square conflict" with the ruling here (Opp. at 13), and, in any event, the Seventh Circuit in *Denberg v. United States R.R. Retirement Bd.*, 696 F.2d 1193, 1196 (1983), *cert. denied*, 466 U.S. 926 (1984), has read *Susquehanna* to limit its reach. Opp. at 14. Respondents are wrong on both counts.

To begin with, respondents' effort to distinguish *Susquehanna* is unavailing. Pointing to the fact that in *Susquehanna* the Nuclear Regulatory Commission had "informally authoriz[ed]" the discharge of contaminated water (Opp. at 13), while here petitioner is challenging the FCC's failure to take action, respondents argue that the facts in *Susquehanna* present "a more colorable justification for judicial intervention than is presented here." *Id.* But respondents' argument is irrelevant on question of whether review may be had in the district court, the issue on which the Third and Fifth Circuits are in irreconcilable conflict. Moreover, the FCC's one-step licensing regulations have given broadcasters at least as much of an authorization to proceed with construction as the NRC's "informal authorization" in *Susquehanna*, and hence even that semantic distinction fails. Finally, respondents' purported distinction is meaningless, since

it is by now settled doctrine that an agency's failure to act may be properly challenged under the Administrative Procedure Act in precisely the same way final agency action may be challenged. *See* 5 U.S.C. §§ 555(b) & 706(1); *see also TRAC*, 750 F.2d at 76-77, 79; *Cutler v. Hayes*, 818 F.2d 879, 894-99 (D.C. Cir. 1987) and cases cited therein.

Respondents' fall-back suggestion, that the Seventh Circuit's decision in *Denberg* limits the reach of *Susquehanna*, and thereby lessens the deleterious impact of the conflict among the Circuits, is also in error. In *Denberg*, the Seventh Circuit cited *Susquehanna* approvingly, noting that, where "the administrative proceeding is informal and the record of the proceeding has to be reconstructed in the judicial review proceeding before judicial review proper can begin," that "would be a case of 'inadequacy' of the special review proceeding" justifying resort to the district court. *Denberg*, 696 F.2d at 1196 (citing 5 U.S.C. § 703). If that is a limitation, it is not one that helps respondents. As this case and *Susquehanna* exemplify, NEPA and NHPA cases will often arise where "the administrative proceeding is informal" and the courts will have to construct a record before judicial review can begin. Far from supporting respondents, *Denberg* further underscores the division among the Circuits on this critical jurisdictional issue.[2]

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[2] This case, like *Susquehanna*, plainly falls within the exception recognized in *Denberg* that district court review must be available where special review statutes afford an inadequate remedy. However, we do not disagree with the general rule recognized in those cases that where an agency actually considers NEPA and NHPA claims in the course of licensing proceedings, then the agency's final action would be subject to challenge using the special review statutes. Thus, for instance, under the FCC's former two-tier licensing system, the Neighborhood Association would have made its objections known to the FCC during the FCC's deliberation on whether to grant Crescent Communication a

footnote continued

3. Although respondents cite *Florida Power & Light Co. v. Lorion*, 470 U.S. 729 (1985), they seem to have missed its point. Respondents cite *Florida Power & Light* for the unexceptional proposition that once Congress has created an exclusive statutory review system, "the federal district courts lack jurisdiction over licensing matters." Opp. at 10. But by using open-ended terms like "licensing matters" and avoiding the precise language of § 402(b), respondents never grapple with the question presented here, namely, whether the FCC's failure to comply with the NHPA and NEPA constitutes an "order" or "decision" over which the D.C. Circuit has exclusive jurisdiction.

Florida Power & Light suggests that it does not. There, the Court took a highly pragmatic approach in deciding whether a ruling by the Nuclear Regulatory Commission, denying a citizen request to withdraw the operating license of a local power plant, was reviewable in the district court or in the court of appeals. After carefully examining the questions of judicial economy and the adequacy of judicial review, the Court concluded that the court of appeals was the appropriate forum.

Here, those considerations counsel strongly against the position urged by respondents. Respondents' approach would funnel all NHPA and NEPA claims directly to the D.C. Circuit — without regard to whether

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construction license. If the FCC had granted a license over the Neighborhood Association's objection, then the Association would have been limited to challenging that ruling in the D.C. Circuit. There is good reason for this asymmetry. In that situation, there would be a final FCC "order" for the court to review, there would be a fully developed record on the NEPA and NHPA claims, which would allow for orderly appellate review, and there might be a number of other challenges to the FCC's action, some of which are likely to raise questions under the Communications Act. In contrast, here, not only is each of those factors absent, but there is ongoing irreparable injury that can only be remedied by immediate judicial intervention which the district courts are best equipped to provide. *See* 5 U.S.C. § 703.

the challenged agency action falls within the purview of § 402(b) or whether appellate review serves the interests of judicial economy. As this case illustrates, however, that approach would require the D.C. Circuit to establish procedures for handling emergency requests for injunctions and appointing masters or district judges to engage in fact-finding. That would hardly be a sensible way to allocate scarce judicial resources. Accordingly, petitioner submits that respondents' theory, and that adopted by the court below, cannot be squared with the approach that this Court took in *Florida Power & Light*, and hence this Court's review is warranted.

B. The Proper Timing For Review.

Remarkably, respondents are entirely silent on the Fifth Circuit's other ruling, namely that the Neighborhood Association is foreclosed from seeking review of its NHPA and NEPA claims until the FCC issues a final order. Indeed, respondents do not even address the impact that this holding will have on the effective enforcement of NHPA and NEPA. Nor do respondents contest that, under the ruling below, the irreparable harm that petitioner is seeking to avert — the construction of a 200 foot high broadcast tower in an historic district — will occur well before the Neighborhood Association can seek judicial review, let alone secure a ruling on the merits. Nor can it be doubted that by the time petitioner can bring its claims, the practical fact is that the FCC will be reluctant to require the removal of the completed tower. *See Sierra Club v. Marsh*, 872 F.2d 497 (1st Cir. 1989). Inevitably, after-the-fact "compliance" with NEPA and NHPA will do little to inform agency decision making, much less protect the public from harm to the environment or to its cultural and historic resources.

As we emphasized in our petition, the jurisdictional path laid down by the Fifth Circuit virtually guarantees the subversion of the important federal interests sought

to be protected by NHPA and NEPA. In an effort to blunt the harshness of this rule, respondents suggest that "[t]he dispute over the construction of the tower is for the local authorities, not the FCC." Opp. at 9. However, the suggestion that the FCC has *no* authority over the construction of the tower is contradicted by 47 U.S.C. § 319(a), which sets out the general rule that the FCC may not issue an operating license "unless a permit for construction has been granted by the Commission." While the FCC has elected to dispense with the requirement of a separate construction permit, *see id.* at § 319(d), it may not dispense with congressionally mandated environmental review laws by shifting its responsibility onto local zoning authorities.

Congress has made the judgment that it is essential to have a federal system of environmental and historical preservation, enforceable in federal courts, and that these important national interests should not be entrusted to the often parochial interests of local authorities. The enactment of NHPA and NEPA reflects a strong national commitment to the protection of our environment and heritage, yet the ruling below threatens to turn these mandates into toothless tigers.

CONCLUSION

For the reasons stated above and in the petition for certiorari, the Court should review the judgment entered by the Fifth Circuit in this case.

Respectfully submitted,

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